

**Hearing (status) date: April 14, 2011, at 2:00 p.m.**  
**Response deadline: April 7, 2011, at 4:00 p.m.**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA**

**In re:**

## Chapter 11

**CIRCUIT CITY STORES, INC., et al.,**

**Case No. 08-35653 (KRH)**

## DEBTORS

**(Jointly Administered)**

**RESPONSE BY COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF  
REVENUE TO LIQUIDATING TRUST'S EIGHTEENTH OMNIBUS OBJECTION TO  
CLAIMS FILED BY TAXING AUTHORITIES**

TO THE HONORABLE KEVIN R. HUENNEKENS, UNITED STATES BANKRUPTCY  
JUDGE:

NOW COMES Navjeet K. Bal, as she is Commissioner of Revenue for the Commonwealth of Massachusetts (hereinafter, “MDOR”), and responds in opposition to the *Liquidating Trust’s Eighteenth Omnibus Objection to Claims Filed by Taxing Authorities* (hereinafter, the “Objection”). The claim filed by MDOR at issue in the Objection is Claim No. 12953 in the priority unsecured amount of \$3,359.57. The Liquidating Trust seeks the expungement of this claim on the grounds that the “Debtor’s books and records reflect no liability.” For the reasons set forth herein, the Objection must be over-ruled and the subject claim must be allowed. In connection therewith, MDOR states as follows:

## I. FACTUAL BACKGROUND

1. On November 20, 2008, the debtor, Circuit City Stores, Inc. and several of its affiliates (hereinafter, the “Debtors”), filed voluntary petitions for relief under Chapter 11 of the

United States Bankruptcy Code (the “Petition Date”). Among the Debtors is an affiliate known as or formerly known as Circuit City Purchasing Company, LLC (hereinafter, “CCPC”).

2. In or about November 2007, MDOR commenced an audit examination of CCPC and its books and records for its Massachusetts sales/use taxes for the periods that eventually ran from March 1, 2005 through November 30, 2008 (the “Periods at Issue”). From time to time, as necessary and appropriate, MDOR received from CCPC written extensions of the statute of limitations for assessment in accordance with M.G.L. c. 62C, § 27, as well as eventually obtaining the statutory extension under M.G.L. c. 62C, § 26(b).

3. On or about February 20, 2009, with a letter by the auditor’s manager, MDOR informed CCPC of the adjustments that through the audit examination MDOR would propose and also provided CCPC with copies of the audit work-papers. At that time as well, CCPC was invited to confer with MDOR’s audit bureau in an audit Exit Conference by March 2, 2009. CCPC did not confer or request to confer with MDOR’s auditors by that time.

4. As MDOR indicated it would in the February 20<sup>th</sup> letter if CCPC did not respond, MDOR issued on or about March 7, 2009, to CCPC a Notice of Intent to Assess (the “First NIA”) in accordance with the provisions of M.G.L. c. 62C, § 26 for additional Massachusetts sales/use taxes for the periods from March 1, 2005 through September 30, 2007. Similarly, MDOR issued on or about March 13, 2009, to CCPC a Notice of Intent to Assess (the “Second NIA”, and together with the First NIA, the “NIAs”) in accordance with the provisions of M.G.L. c. 62C, § 26 for additional Massachusetts sales/use taxes for the periods from October 1, 2007 through November 31, 2008. Copies of the First NIA and the Second NIA are annexed hereto as Exhibits 1 and 2 respectively, and are incorporated herein by this reference.

5. Upon the issuance of the NIAs, CCPC had a statutory opportunity to “confer with the commissioner or his duly authorized representative as to the proposed assessment within thirty days after the date of such notification.” M.G.L. c. 62C, § 26(b). In the ordinary course for this stage, the matter would be transferred to MDOR’s Office of Appeals (“OOA”). The response date for the First NIA was April 6, 2009 and for the Second NIA April 12, 2009.

6. CCPC did not make a request for further review of the proposed additional assessment as set forth in the NIA.

7. On April 19, 2009, MDOR assessed CCPC additional sales taxes for the Periods at Issue. On April 21, 2009, MDOR issued to CCPC a Notice of Assessment in accordance with the provisions of M.G.L. c. 62C, § 26 for additional Massachusetts sales/use taxes for the period of November 2008 (the “First NOA”). On May 5, 2009, MDOR issued to CCPC a Notice of Assessment in accordance with the provisions of M.G.L. c. 62C, § 26 for additional Massachusetts sales/use taxes for the periods from March 1, 2005 through October 31, 2008 (the “First NOA”, and together with the First NOA, the “NOAs”). Copies of the First NOA and the Second NOA are annexed hereto as Exhibits 3 and 4 respectively, and are incorporated herein by this reference.

8. Section 362(b)(9)(D) of the Bankruptcy Code provides an exception to the automatic stay for “the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment”.

9. On or about May 11, 2009, MDOR filed an amended proof of claim in the priority unsecured amount of \$3,359.57, which claim has been designated claim no. 12953 (the “MDOR Claim”). This claim consists of the additional taxes assessed in the manner described above, together with interest for each period up to the Petition Date.

## II. LEGAL STANDARD

10. When the non-bankruptcy law that creates a tax obligation allocates the burden of proof, the burden of proof in an objection to the tax claim in a bankruptcy proceeding is allocated in the same manner. *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000). The MDOR Claim arises under the tax laws of Massachusetts and under those laws the burden is upon the taxpayer (and in this instance, CCPC and the Liquidating Trust) to establish that the claim should not be allowed against the estate. *M & T Charters, Inc. v. Commissioner of Revenue*, 404 Mass. 137, 140 (1988), and *Towle v. Commissioner of Revenue*, 397 Mass. 599, 603 (1986).

11. A proof of claim filed in accordance with the Bankruptcy Rules is prima facie evidence of the validity and the amount of the claim. Fed. R. Bank. P. Rule 3001(f); *In re Hemingway Transport, Inc.*, 993 F.2d 915, 925 (1<sup>st</sup> Cir. 1993), *cert denied*, 506 U.S. 891 (1993); *United States v. Braunstein*, 209 B.R. 152, 155, 157 (Bankr. D. Mass. 1997). To rebut the presumption that attaches to a proof of claim, the objecting party must come forward with "substantial evidence" in support of its asserted grounds. *Hemingway Transport*, 993 F.2d at 925. The mere filing of an objection to a proof of claim with nothing more is in itself "insufficient to overcome the rebuttable presumption." *In re White*, 168 B.R. 825, 828 (Bankr. D. Conn. 1994).

12. The basis of the MDOR Claim is statutory – the statutes being the tax laws of the Commonwealth. "Courts have consistently rejected the argument that this documentation requirement extends to claims based upon statutory, rather than written, obligations." *United States v. Braunstein (In re Pan)*, 209 B.R. 152, 156 (D. Mass. 1997) ("insufficient documentation" not a basis for objection to or for disallowance of IRS responsible person assessment). See, also, *State Board of Equalization v. Los Angeles International Airport Hotel Associates (In re Los Angeles International Airport Hotel Associates)*, 106 F.3d 1479, 1480 (9<sup>th</sup>

Cir. 1997)(“insufficient documentation” not a basis for objection to or for disallowance of state use tax assessment) and *In re White*, 168 B.R. at 829 (same for estimated federal income taxes).

**III. THE GROUNDS ASSERTED IN THE OBJECTION ARE INSUFFICIENT AND INADEQUATE TO DISALLOW THE MDOR CLAIM OR ANY PORTION OF IT**

13. Section 502(b) of the Bankruptcy Code lists the grounds upon which a claim filed by a creditor may be disallowed. The condition of a debtor’s business records, and in particular an allegation that a debtor cannot find in its records the claim in issue, does not exist in any of the sub-paragraphs of Section 502(b) as a ground for the disallowance of a claim against the estate.

14. Although greater clarity would have been beneficial, upon information and belief the Objection to the MDOR Claim may be intended to have been raised under Section 502(b)(1) of the Bankruptcy Code, that the “claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.”

15. The liabilities presented in the MDOR Claim are for taxes that were lawfully assessed by MDOR based upon the books and records of CCPC and in accordance with applicable law. On numerous occasions, CCPC was given an opportunity to be heard. Once those taxes were assessed, CCPC was statutorily required to pay them. M.G.L. c. 62C, § 32. Of course, as CCPC was then a debtor, the time of actual payment was governed by the Bankruptcy Code and the proceedings in its case.

16. “What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of

overruling federal law, is to be determined by reference to state law.” *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946). "Unless some federal interest requires a different result, there is no reason why [the state] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55 (1979).

17. The Liquidating Trust has not identified any provision of the Bankruptcy Code or other applicable federal law that would over-ride or otherwise limit what has been established and fixed under state law, that CCPC and the bankruptcy estates owe the Massachusetts taxes as set forth in the MDOR Claim.

18. The sole factual allegation proffered by the Liquidating Trust in the Objection for the disallowance of the MDOR Claim is that these liabilities are not reflected in the Debtor’s books and records. The allegation to the effect that a taxpayer’s records or books of account do not show the liability is not a ground for the abatement or other relief from a tax assessment under applicable non-bankruptcy law. *Shulam v. Commissioner of Revenue*, Mass. A.T.B. No. C287963, 2008 Mass. Tax LEXIS 27 (2008). “In the absence of substantial, credible evidence establishing that the subject assessment was excessive in amount or illegal, the assessment is presumed to be correct,” *Pippins v. Commissioner of Revenue*, Mass. A.T.B. No. 203199, at 8, 1997 Mass. Tax LEXIS 13 (1997), *affirmed* 44 Mass. App. Ct. 1108 (1998).

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**WHEREFORE**, Navjeet K. Bal, as she is Commissioner of Revenue for the Commonwealth of Massachusetts, respectfully requests that this Honorable Court deny the *Liquidating Trust's Eighteenth Omnibus Objection to Claims Filed by Taxing Authorities* as it concerns Claim No. 12953, and for such other and further relief as may be just and meet.

**Respectfully submitted,**

**Dated: April 1, 2011**

**NAVJEET K. BAL  
COMMISSIONER  
MASSACHUSETTS DEPARTMENT OF  
REVENUE**

**By her attorneys,**

**MARTHA COAKLEY  
ATTORNEY GENERAL OF  
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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA**

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**In re:**

**CIRCUIT CITY STORES, INC., *et al.*,**

**DEBTORS**  
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) **Chapter 11**  
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) **(Jointly Administered)**  
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**CERTIFICATE OF SERVICE**

I, Stephen G. Murphy, hereby certify that I have this day served a copy of the within  
**RESPONSE BY COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF  
REVENUE TO LIQUIDATING TRUST'S EIGHTEENTH OMNIBUS OBJECTION TO  
CLAIMS FILED BY TAXING AUTHORITIES**, electronically upon filing or by first class  
mail, postage prepaid, upon the parties or persons appearing on the accompanying SERVICE  
LIST as indicated.

// Stephen G. Murphy //  
Stephen G. Murphy, Esquire  
Dated: April 1, 2011



**SERVICE LIST**

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